

<p><b>REDACTED VERSION</b></p>
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and WILLIAM SMITH, on behalf of themselves and all others similarly situated

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERONICA GUTIERREZ, ERIN WALKER and  
WILLIAM SMITH, as individuals, and on behalf  
of all others similarly situated,

Plaintiffs,

v.

WELLS FARGO & COMPANY; WELLS  
FARGO BANK, N.A.; and DOES 1 through 125,

Defendants.

Case No.: C 07-05923 WHA (JCSx)

CLASS ACTION

**[REDACTED] PLAINTIFFS' OPPOSITION  
TO DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Judge Assigned: Hon. William H. Alsup  
Complaint Filed: November 21, 2007

Date: March 19, 2009  
Time: 2:00 p.m.  
Courtroom: 9

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## I

## INTRODUCTION

This is the second time Defendant Wells Fargo Bank, N.A. (hereinafter referred to as "Wells Fargo") has brought a motion for summary judgment challenging the standing of the named class representatives. In doing so, it uses almost the same language and case citations it used the first time it brought a motion for summary judgment. Apparently dissatisfied with the Court's prior ruling, it again seeks to dismiss the named Plaintiffs' claims related to false advertising and misrepresentations. In doing so, Defendant ignores the reality that the Court has already ruled on this issue as to the named Class Representatives. It also ignores the overwhelming evidence demonstrating Wells Fargo's uniform and pervasive scheme of misconduct, misrepresentation and non-disclosure, which results in Plaintiffs meeting all the elements of its claims, including reliance, for both the class claims and the named class representatives that serves to defeat this motion.

The evidence shows unequivocally that [

REDACTED

]

[

REDACTED

] Prior to 2001, Wells Fargo sorted debit card transactions before checks and automated clearing house (hereinafter referred to as "ACH") charges and sequenced them from lowest to highest. [

REDACTED

1 REDACTED

2  
3  
4 ]

5 | REDACTED

6 ] Wells Fargo actively, systematically and intentionally misrepresented to its customers how it  
7 sequenced debit card transactions. Worse, those misrepresentations were directed specifically at the  
8 overdraft target customers. Throughout its marketing material, online material and most sinisterly, its  
9 financial education program, Wells Fargo misrepresented that when using a debit card, funds were  
10 immediately withdrawn from the account, instead of what actually occurred, which was Wells Fargo  
11 waiting until the middle of the night, grouping all the transactions together, and re-sequencing them  
12 from highest to lowest.

13 | REDACTED

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20  
21 ]

22 Finally, Wells Fargo intentionally and systematically misrepresented “available balance” as the  
23 most current picture Wells Fargo had of current and past transactions, which included all debit card  
24 transactions for the customer from the last 60-90 days. It is undisputed that this representation is false.

25 | REDACTED

26  
27 ]

1 Related to the effect of these misrepresentations, Plaintiffs have submitted a report from a highly  
 2 reputable and qualified expert, Dr. Lewis Mandel, that the class has been damaged by these  
 3 misrepresentations because they have the tendency to deceive a reasonable consumer. Defendant  
 4 apparently does not intend to dispute this element of Plaintiffs' claim as it did not file a report from an  
 5 expert on the subject. As to the individual class members, as the following will demonstrate, they  
 6 easily meet the threshold test for reliance and damages. Therefore, this motion is totally without merit  
 7 and should be denied for all the same reasons this challenge was unpersuasive in the first motion, and  
 8 because of the additional reasons set forth by the evidence learned in discovery as discussed below.

## 9 II

### 10 FACTUAL BACKGROUND

11 A. REDACTED

12 REDACTED

13 ] Point

14 of sale debit card use comprises the greatest percentage of overdraft fees (FDIC Study of Bank  
 15 Overdraft Programs November 2008 (hereinafter referred to as "FDIC Study"), Ex. 2 at v, ¶ 7.) |

16 REDACTED

17 ]

18 REDACTED

19 ] (April 2001 Statement of Eugenia Espinosa, Ex. 3; | REDACTED

20 ] When Wells Fargo changed this practice to group charges and then order the  
 21 transactions from highest to lowest, it served to increase the number of overdraft transactions when there  
 22 was an overdraft of the account, because on average the charges for debit card transactions are much  
 23 lower than the charges for checks and ACH charges. (FDIC Study, Ex. 2 v, ¶ 8.) After Wells Fargo

1 merged with Norwest in late 1998 (Wells Fargo November 2, 1998 News Release, Ex. 5), and the  
 2 former top Norwest executives, Richard Kovacevich and Leslie Biller began running Wells Fargo  
 3 (Deposition of Leslie Biller, Ex 6, 9:3 -10:13.), [ REDACTED

4  
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 6  
 7  
 8  
 9 ] Not  
 10 surprisingly, customers who are the most susceptible to overdrawing their account are those with the  
 11 least means and/or who are the most financially unsophisticated. Federal studies and Wells Fargo's own  
 12 research show that customers who overdraft their accounts fall largely into one or more of the following  
 13 categories: 1) low to moderate income (FDIC Study, Ex 2 at v, ¶ 5&6); young customers aged 18-25  
 14 years old (FDIC Study Ex. 2 at v, ¶ 10); [ REDACTED

15 ]  
 16 In targeting this financially vulnerable sub-set of customers for even more profit from overdraft  
 17 fees than they were already incurring, Wells Fargo's motivation was pure greed. It certainly was not  
 18 necessary to its reasonable business operations, profit, or return on shareholder investment. [ REDACTED  
 19 ] it  
 20 boasted having a record first quarter profit, recording net income being up 12% from the year before.  
 21 (April 17, 2001 Wells Fargo News Release, Ex. 10.)

22 Wells Fargo's executives were also already being well compensated without the need to pad their  
 23 income from increasing overdraft fee income from the target overdraft customers. Wells Fargo's CEO  
 24 Richard Kovacevich, (formerly of Norwest) had a cash compensation package of over \$13 million for  
 25 1999 and 2000, plus \$329,000 in 401(k) benefits, \$280,000 in other compensation (2002 Proxy  
 26  
 27  
 28



1 Statement, Ex. 11, at p. 23), as well as the use of the corporate jet(s)<sup>1</sup>. That was in addition to the \$66  
 2 million in exercisable options that Mr. Kovacevich held, and the 646,300 option shares granted to him in  
 3 2000 that, based on projections established by the SEC of what they would be worth when they could be  
 4 exercised, were valued at between \$13 and \$34 million. (2002 Proxy Statement, Ex. 11, p. 25.) Other  
 5 than the pure greed of Wells Fargo and its executives, there was no valid reason to target its most  
 6 financially vulnerable customers to generate hundreds of millions of dollars of additional overdraft fees.

7 It is worth noting that Wells Fargo did not spread these increased fees over all of its customers  
 8 through account service fees. Its more sophisticated customers would never have stood for it. So  
 9 instead, in what can only be described as corporate and executive cowardliness and greed, Wells Fargo  
 10 embarked on a secret manipulative scheme to target those least able to defend themselves from the  
 11 unscrupulous practices, [ REDACTED ] that would  
 12 directly benefit Wells Fargo's executives. As will be shown below, not only were those practices  
 13 standing alone unfair and illegal under California's consumer protection statutes, Wells Fargo has and  
 14 continues to make specific and intentional misrepresentations regarding those practices to its target  
 15 group of low-income, young adults and new customers.

16 **B. Wells Fargo Engaged in a Systematic Pattern of Misrepresenting to the Target Group the**  
 17 **Order it Sequenced Debit Card Transactions**

18 One of Plaintiffs' claims ("re-sequencing" claim) is that Wells Fargo intentionally increased the  
 19 number of transactions for which overdraft fees were assessed by artificially re-sequencing debit card  
 20 transactions from the order in which they occurred and had been approved by Wells Fargo, to a highest  
 21 to lowest order when calculating overdraft fees at the time of posting. The result of this re-sequencing  
 22 was to increase the number of transactions that would be assessed an overdraft fee when the account was  
 23 overdrafted, as illustrated by what happened to Class Representative Veronica Gutierrez. (Order  
 24 Denying Defendant's Motion for Summary Judgment and Granting in Part and Denying in Part  
 25 Plaintiffs' Motion for Class Certification, 11:24 – 12:16.)

26  
 27  
 28 <sup>1</sup> The current Executive V.P. of Community Banking who directly reports to the CEO, acknowledges executive access to the corporate jets but could not recall exactly how many jets Wells Fargo owns. (Deposition of Carrie Tolstedt, Ex 12, 49:16 – 25.)

1 For this inherently unfair practice to be legal, Wells Fargo would have had to have in place clear  
 2 and prominent disclosures. However, not only did Wells Fargo not provide any adequate disclosures,  
 3 Wells Fargo intentionally and systematically misrepresented this practice in its marketing, and  
 4 educational material by either explicitly or implicitly representing that when customers use debit cards,  
 5 the funds are *immediately* withdrawn from the account. If that statement were true, then the number of  
 6 overdraft transactions would be based on a chronological order of posting rather the high to low posting  
 7 order employed by Wells Fargo.

8 **1) Wells Fargo Explicitly and Falsely Represented that When Using a Debit Card, the**  
 9 **Funds are Immediately Withdrawn From the Account**

10 The most egregious example of the false information that Wells Fargo provided to its customers  
 11 was the educational program Wells Fargo developed for the young, inexperienced and low-income  
 12 customers to “teach” them about checking accounts. In what should have been a worthy project,  
 13 starting in 2003, Wells Fargo dispatched 50 employees to develop an educational program it called  
 14 “Hands on Banking” in order to educate customers and potential customers about financial issues  
 15 involved with consumer banking. It created the program in both English and Spanish. (Wells Fargo’s  
 16 2007 Corporate Citizenship Report (hereinafter referred to as “Citizen Report), Ex. 13, p. 29.)

17 The program was developed in a way where it would be provided to young adults as well as  
 18 school-aged children. It was produced so that it could be presented as a video presentation, in written  
 19 form, or viewed online. Wells Fargo created CD’s of video instructions and written curriculum  
 20 designed for teachers to assist them in teaching young people about checking accounts. In 2006 and  
 21 2007, it distributed over 400,000 of these CD’s to schools. In the same two year period, it trained  
 22 11,000 Wells Fargo employees to go out and teach students in schools about how checking accounts  
 23 work. (Citizen Report, Ex. 13, p. 29.) While there has not been a record kept, with 400,000 CD’s sent  
 24 to teachers over just a two year period, presumably tens of millions of students who comprise the  
 25 overdraft target “young and inexperienced” groups have been taught in their schools about how debit  
 26 cards work using the *Hands on Banking* program.

27 The program was also developed so that young, inexperienced, and low-income customers could  
 28 access the information online. Pamela Erwin, the creator and Wells Fargo employee responsible for  
 creating and maintaining the *Hands On Banking* program, confirmed that Wells Fargo, through its

1 foundation created and maintained the *Hands on Banking* site (Deposition of Pamela Erwin (hereinafter  
 2 referred to as "Erwin"), Ex. 14, 43:9-11), and then heavily promoted it to its target overdraft customers.  
 3 Virtually almost anywhere that Wells Fargo provided either marketing or educational information to  
 4 low-income, young adult or new customers, it referred them to *Hands on Banking*. This included  
 5 marketing brochures to teens (Teen Checking Brochure, Ex. 15; Wells Fargo – Your Child Age 13-17,  
 6 Ex. 16), those with poor credit (Get Back Into Checking With The Wells Fargo Opportunity Package,  
 7 Ex. 17), college students, (Wells Fargo Mobile Marketing Brochure, Ex. 18), and throughout its website  
 8 where it was attempting to "educate" customers or prospective customers on how Wells Fargo checking  
 9 accounts work. This includes prominent placement on its website in the Financial Education section  
 10 (About Wells Fargo – Financial Education webpage, Ex. 19), the student loan section (Wells Fargo  
 11 Student Loans - Managing Your Money webpage, Ex. 20), the student loan administrators section  
 12 (Wells Fargo Student Loans – Student Loan Services for Administrators, Ex. 21), and subprime  
 13 mortgage customers. (Wells Fargo Home Mortgage – Steps to Success webpage, Ex. 22.) Over  
 14 250,000 unique website visitors were provided information about how debit cards worked through  
 15 *Hands on Banking*. (Citizenship Report, Ex. 13, p. 29.)

16 The *Hands on Banking* program consisted of both video and written instructions to customers  
 17 about how debit cards work. In the various media, the information provided to these young and  
 18 inexperienced customers was false and untrue. In the written materials provided to the adult customers  
 19 and used by teachers, it stated:

20  
 21 **"Debit cards**

22 **...remember that whenever you use your debit card, the money is *immediately***  
 23 **withdrawn from your checking account."**

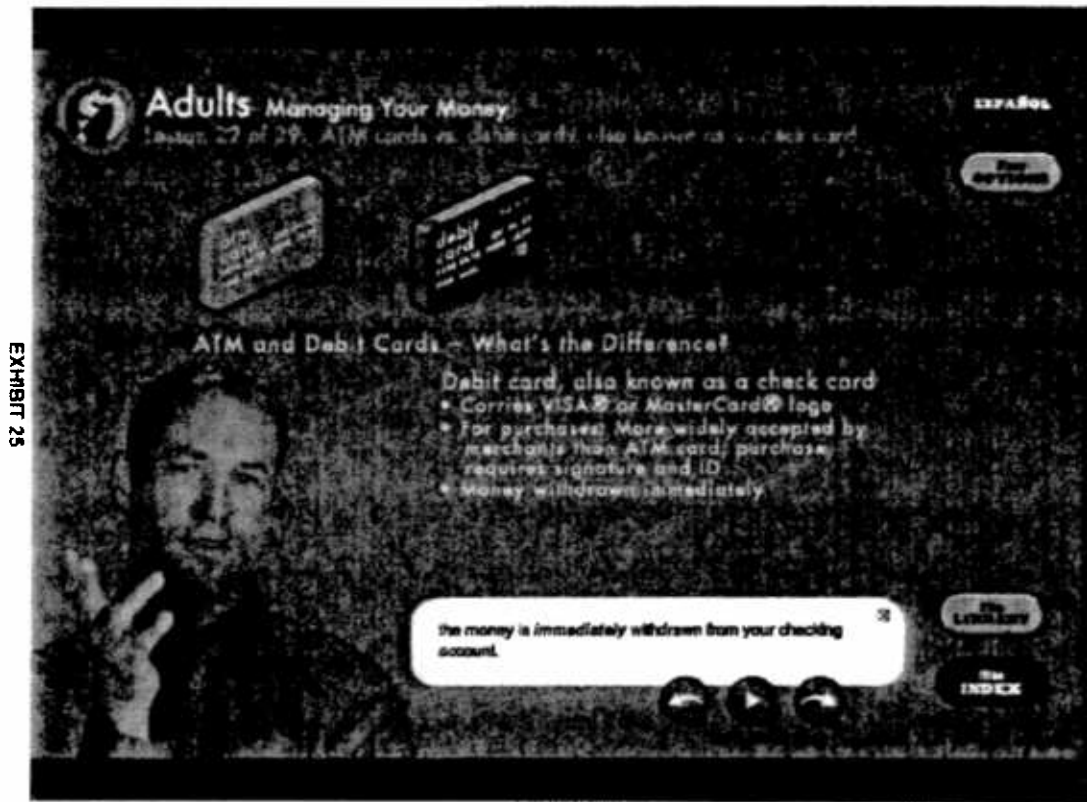
24 (Hands on Banking; Adults Teachers Guide, Ex. 23, p. 47 (emphasis in original).)

25  
 26 To the young adults, Wells Fargo stated:

27 **"Remember, the money comes right out of your checking account the minute you use your**  
 28 **debit card."**

(Hands on Banking, Young Adults Teacher Guide, Ex. 24, p.32.)

1 In the video, where the instructor provides verbal information supported by written text, Wells  
 2 Fargo, even more effectively, provides the same false information to the tens of millions of students and  
 3 web site viewers:



20 (*Hands on Banking*, Screen Capture, Ex. 25.)

21 There is no dispute that these statements are false. (Deposition of Kenneth Zimmerman  
 22 (hereinafter referred to as "Zimmerman"), Ex. 26, 128:5-8.) To the extent Wells Fargo claims that this  
 23 was just an innocent mistake, the facts do not support such a position. The Wells Fargo employee who  
 24 created the *Hands on Banking* program, Pamela Erwin, worked for the Wells Fargo foundation. (Erwin,  
 25 Ex. 14, 8:10-14.) She testified that Wells Fargo assigned a Consumer Deposit Group employee to  
 26 oversee the text contained in *Hands on Banking* related to Wells Fargo's product and services. (Erwin,  
 27 Ex. 14, 20:23 - 22:10.) The Consumer Deposit Group is the group responsible for consumer checking  
 28 accounts. (Zimmerman, Ex. 26 13:22 - 15:3.) The Consumer Deposit Group was provided and

specifically approved false statements found in the text related to debit card transactions being immediately withdrawn from the checking account and that purchases would not be approved if there were insufficient funds in the account. (Erwin, Ex. 14, 24:10 – 22.) Rather incredibly, the legal department also approved the false representations. (Erwin, Ex. 14, 24:25 – 25:3.)

The Consumer Deposit Group and legal department were not given just one chance to review and approve the text. Approximately every 12-16 months, or when there were changes to the content, the text would be reviewed for updates. These misrepresentations were approved each time by both the Consumer Deposit Group and legal department. (Erwin, Ex. 14, 29:16 – 31:2.) From 2005 (and possibly since 2003) to December 31, 2008 (Erwin, Ex. 14, 31:8 – 32:12), Wells Fargo has consistently and knowingly provided false information to customers about the sequencing of debit card transactions through the *Hands on Banking* financial education program.

These misrepresentations in *Hands on Banking* are not isolated instances of providing false information to the target group of young, inexperienced and low-income customers on this subject. Wells Fargo had this same false language on its website in the section entitled “Managing Your Money” (until 2005), where it stated:

**Debit Cards.** Debit cards can be used wherever Visa and Mastercard debit cards are accepted. They differ from credit cards in that the money is immediately withdrawn from your account. Debit cards can be an effective way to manage your finances, because you can’t spend more than you have.

(“Managing Your Money” (2005) webpage; Ex. 27 (underline added).)

## **2) Wells Fargo Implicitly Falsely Represented That When Using a Debit Card, the Funds Are Immediately Withdrawn From the Account**

In addition to the explicit misrepresentations regarding immediate withdrawal, Wells Fargo made widespread and consistent implied representations that with debit card use, the funds are immediately withdrawn from the account. The example that was the most wide-spread and damaging to the class was the immediate withdrawal sequence order Wells Fargo portrayed to its online customers. Wells Fargo’s records show that [REDACTED] who overdraw their account each year utilize online banking. (WF SI No’s 2, 6, Ex. 1.) These online customers access their account and are provided with “pending transaction” information by Wells Fargo. For transactions not yet



1 posted, the customer is shown the listed pending transactions in chronological order. Further, the  
2 available balance is reduced for each listed pending charge. (William Smith's July 16, 2007 Account  
3 Activity online print-out, Ex. 28.) What this tells the customer implicitly if not explicitly, is that not  
4 only are the funds processed in chronological order, the funds are immediately withdrawn from the  
5 account.

6 Wells Fargo has consistently made these same misrepresentations in its marketing materials.  
7 Every new account holder receives a marketing jacket when they open an account that provides  
8 information on the checking account (Wells Fargo Response to Plaintiffs' Request for Admissions No.  
9 1, Ex. 29.) That jacket houses the account agreement and fee schedule that is given to each new  
10 customer.

11 The language used in the jacket to describe debit cards most likely came from the Deposit Group  
12 (Deposition of Brenda Yost (hereinafter referred to as "Yost"), Ex. 30, 35:18 – 36:1), which is the same  
13 Group that approved the "immediately withdrawn" language in *Hands on Banking*. Also, like the  
14 language in *Hands on Banking*, the language used was first approved by the legal department. (Yost,  
15 Ex. 30, 35:9 – 17.) The jacket, in describing the check card ("debit card" and "check card" are used  
16 interchangeably by Wells Fargo), stated:

17 **Each purchase is automatically deducted from your primary checking account**  
18 (Wells Fargo New Customer Jacket, Ex. 31 (emphasis added).)

19 Wells Fargo's Senior Vice-President of Debit Card Marketing, Ms. Brenda Yost, who has the  
20 responsibility for marketing the debit cards, admitted in deposition, what is obvious in reading the  
21 statement: *Automatically* deducted implies *immediately* withdrawn. (Yost Ex. 30, 35:18 – 36:18.)

22 This jacket, given to new customers, was not the only place that this misrepresentation of  
23 automatically deducted transactions was presented to Wells Fargo customers. In marketing messages  
24 that go out to customers with their statements, Wells Fargo regularly promoted the use of debit cards to  
25 the target overdraft customers, by describing the debit cards as having funds "automatically deducted"  
26 from the checking account. (Debit Card Message Request, Ex. 32; Check Card Brochure, Ex. 33; *Get*  
27 *Back into Checking* with the Wells Fargo Opportunity Package brochure, Ex. 17; and *Check, Savings &*  
28 *More Brochure*, Ex. 34.) Despite the acknowledgement by a senior Wells Fargo executive that the term

1 is misleading, the term “automatically deducted” continues to be used to describe how debit card funds  
 2 are deducted from checking accounts. (Wells Fargo “How do Wells Fargo’s Check Cards Work”  
 3 webpage, Ex. 35.)

4 **3) Wells Fargo’s Disclosures Regarding Re-Sequencing Were Grossly Inadequate in Light**  
 5 **of Its Practice and Misrepresentations About the Practice**

6 Buried deep in the Consumer Account Agreement, and part of a lengthy and dense statement,  
 7 Wells Fargo indicates that the bank *may* post items in any order the Bank chooses unless the law  
 8 governing the account prohibits a particular order; that it *may* if it chooses post items in order of the  
 9 highest dollar amount to the lowest dollar amount; and that the Bank *may* change the order of posting  
 10 without notice. (2005 Consumer Account Agreement, Ex. 36 at p. 27.)

11 Those statements indicate what the Bank might do, not what the Bank is doing, leading the  
 12 customer to believe that sequencing from highest to lowest is not what the Bank is doing at the present  
 13 time. It certainly does not indicate that Wells Fargo has, for over [REDACTED ], had an automated secret  
 14 daily routine of artificially re-sequencing debit card transactions from highest to lowest to increase the  
 15 number of overdraft fees when the customer has overdrafted their account.

16 The evidence of how meaningless this language is as disclosure language, is that Wells Fargo  
 17 used identical language indicated that it *may* post from highest to lowest in its 1999 Account  
 18 Agreements (1999 Consumer Account Agreement And Safe Deposit Box Lease Terms, Ex. 37, at p.22-  
 19 23), when its actual practice was to sequence transactions from *lowest to highest*. When the exact same  
 20 language is used to disclose two polar opposite ways of posting, it can hardly be stated that the  
 21 disclosure is adequate to explain to customers how Wells Fargo sequences the posting order.

22 The disclosure language found in other parts of the account agreements covering the class period  
 23 also conflict with the language stating the Bank *may* post from highest to lowest. For instance, on page  
 24 26 of the agreement, it states:

25 **The Bank may debit your Account on the day an *Item* is presented by any means, including**  
 26 **without limitation electronically, or at an earlier time based on notification received by the**  
 27 **Bank that an Item drawn on you your Account will be presented for payment or collection.**

28 (2005 Consumer Account Agreement, Ex. 36 at p. 26.)

1 This language would suggest that debit card transactions are posted when the Bank authorizes the  
 2 transaction, rather than at some later date, which is consistent with Wells Fargo's other representations  
 3 that when a customer uses a debit card, the funds are immediately withdrawn from the account.

4 While it is possible to interpret the confusing and conflicting disclosure language in a number of  
 5 different ways, if its intent was to notify customers that Wells Fargo had a practice of re-sequencing  
 6 debit card transactions in the middle of the night, at which time it would change the processing or  
 7 posting from a chronological order to a highest to lowest order, it certainly did not serve that function.  
 8 Wells Fargo completely fails to indicate how the posting or sequencing actually works. In light of the  
 9 express and implied representation that when customers use the debit card, funds are immediately  
 10 withdrawn from the account, these disclosures are meaningless and useless.

11 **C. Wells Fargo Engaged in a Systematic Pattern of Misrepresentation Regarding the**  
 12 **Accuracy of Available Balances that Caused Customers to Overdraft Their Accounts**

13 Plaintiffs' second claim ("including then deleting" class claims) is that through marketing and  
 14 providing false and inflated account balance information, Wells Fargo induced customers to overdraft  
 15 their accounts. It is undisputed that the "available balance" figure provided to customers does not  
 16 include all pending debit card charges. For check cards purchases, only 8% of those transactions are  
 17 posted within one business day. (Deposition of Stacey Pinkerd, Ex. 38, 14:15 - 17:16.) In spite of this  
 18 fact, for Wells Fargo's customers' [ REDACTED

19  
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 21  
 22 ]

23 Because of the obvious concern with using the term "available balance" when that figure is often  
 24 inflated and inaccurate, Wells Fargo would need significant disclosures to charge overdraft fees on  
 25 transactions where Wells Fargo provided inflated available balance information. Yet Wells Fargo did  
 26 the opposite. [ REDACTED

27 ] (Zimmerman, Ex. 26 77:1 - 78:21.)  
 28



1 Further, and even more sinisterly, Wells Fargo actively misrepresented the available balance to  
2 customers:

3 **“Why are my available balance and ending balances different?**

4 **Your available balance is the most current information regarding the funds you  
have available for withdrawal, ATM or Check Card purchases, or writing checks.**

- 5 • **It reflects the latest balance based on transactions recorded to your  
account today, including direct deposits, paid checks, withdrawals,  
6 and point-of-sale purchases.”**

7 (Wells Fargo’s Account Activity Questions webpage, Ex. 39.)

8 In another webpage, Wells Fargo made clear that the “current information” includes all pending  
9 transactions when:

10 **“The Account Activity screen shows all of your recent and pending transactions for the last  
11 60-90 days”**

12 (Wells Fargo Online Statements Questions, Ex. 40, (underline added).)

13 There can be no dispute that this statement is false and an express and intentional  
14 misrepresentation. There can also be no dispute that Wells Fargo heavily promoted and marketed the  
15 use of available balance both online and in print advertisements. (Print Advertisements, Ex. 41.)

16 [ REDACTED

17  
18  
19  
20  
21  
22  
23 ] (Deposition of Karen Moore, Ex. 43,  
24 37:21 - 39:7.)

25 Wells Fargo intentionally misrepresented this [ REDACTED ] by falsely stating in  
26 financial literacy and education materials that:

27 **“If you do not have enough money in your account to cover the withdrawal, your purchase  
28 won’t be approved.”**

(Hands on Banking Adult Teaching Guide, Ex. 22, p.47.)

1 While this practice is not being directly challenged in this case because of a very suspect  
 2 “settlement” of such a claim by Wells Fargo and other plaintiffs’ counsel in San Diego County Superior  
 3 Court, it is directly relevant to this action because it results in an increase of overdraft fees for both the  
 4 “including and deleting” class members and “re-sequencing” class members.

5 Under these set of facts, where it is clear Wells Fargo has engaged in a systematic and wide-  
 6 spread campaign to at best conceal the true facts from its customers, and in many cases, actively plot to  
 7 confuse or deceive them, it is clear that there is overwhelming evidence to support Plaintiffs’ claims,  
 8 including reliance and damages.

### 9 III

#### 10 SUMMARY OF ARGUMENT

11 Plaintiffs respectfully submit that the Motion of Defendant Wells Fargo Bank, N.A. for Partial  
 12 Summary Judgment on Plaintiffs’ Misrepresentation Claims should be denied based on the following  
 13 grounds:

- 14 (1) This motion by Wells Fargo presents no new law or facts, and is simply a rehashing of  
 15 arguments that the Court has already twice rejected.
- 16 (2) The Class Representatives have standing to bring the misrepresentation and  
 17 nondisclosure claims on behalf of the Classes.
- 18 (3) It is Undisputed that Well Fargo’s systematic and pervasive scheme had the tendency to  
 19 mislead Wells Fargo customers, providing overwhelming evidence that the Certified  
 20 Classes will be able to establish all the necessary elements to prevail on their claims.

### 21 IV

#### 22 ARGUMENT

#### 23 A. Wells Fargo Attempts to Rehash Resolved Issues By Reasserting For the Third Time Its 24 Failed Attack on Plaintiffs’ Standing to Bring Claims

25 After the denial of an earlier summary judgment motion, the moving party may later renew the  
 26 motion by showing a different set of facts or law, or by showing exceptional circumstances justifying  
 27 renewal of the motion. *See Preaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79 (9th Cir. 1979);  
 28 *Golden Gate Hotel Ass’n v. City & County of San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994).

1 However, that is not what Wells Fargo has done. It raises the same arguments, using the same language,  
2 and, relying on the same law and facts that it did in the original motion for summary judgment. Its  
3 position was without merit then, and is without merit now.

4 Defendant attempts to distinguish this motion from the previous motion for summary judgment,  
5 by first acknowledging that it is raising the same issues raised in the first motion for summary judgment  
6 (in fact a review of the two motions shows almost identical language), but attempts to justify the re-  
7 filing through a vague reference to the Court having overlooked the issue when making its ruling.  
8 (Motion, Footnote, 4: 27.)

9 However, Defendant is wrong. The Court spent considerable time in its Order denying the  
10 Motion for Summary Judgment, and explaining the basis for the denial of the Defendant's claim. The  
11 Court found for the "including and then deleting" class that Plaintiffs had evidence there were no  
12 disclosures at all (Court's Order, at pp. 15-16.) The Court further found that Plaintiffs' had evidence  
13 that this practice was deceptive because there is no adequate notice provided to customers when the  
14 included items are deleted, with the potential to deceive customers into thinking they have a larger  
15 balance and inducing them to go into overdraft situations. (Court's Order, at p. 14.)

16 With respect to the practice of re-sequencing the posting of debit card transactions from  
17 chronological order to highest-to-lowest, the Court found that Plaintiffs' had evidence that the disclosure  
18 was inadequate. It is buried deep within the lengthy statement. It only says the bank *might* post items  
19 presented against the account in any order the bank chooses (unless the law requires otherwise). It uses  
20 the word "may" rather than "will," leading the customer to believe, in the context of the statement, that  
21 reordering is not automatic but merely an exception – whereas reordering is a secret daily routine aimed  
22 solely at maximizing penalty revenue for the bank at the expense of the customer. (Court's Order, at p.  
23 15.)

24 The Court further ruled that all three putative Class Representatives have standing to bring all  
25 claims, rejecting Wells Fargo's attack on named Plaintiffs' standing to bring the misrepresentation and  
26 nondisclosure claims. (Court's Order, at pp. 19-20.) The Court has already considered and rejected this  
27 claim. However, the Court has not only considered Defendant's claims once, but again considered them  
28 in the opposition to the Motion for Class Certification, where Defendant claimed that the putative Class

1 Representatives could not establish reliance, causation, and actual injury. (Wells Fargo's Opposition to  
2 Plaintiffs' Motion for Class Certification. at pp. 12-13.)

3 Now for the third time, Wells Fargo challenges the standing of the Class Representatives to the  
4 certified class, using the same language, facts, arguments and law as it has the prior two times. No  
5 matter how many times Defendant ignores the facts to make this same argument, it does not change the  
6 fact that the certified Class and the Class Representatives can easily establish reliance and injury.

7 **B. The Class Representatives Have Standing to Bring Misrepresentation and Nondisclosure**  
8 **Claims Under the Requirements of Proposition 64**

9 Wells Fargo asserts that the Class Representatives have not seen each and every  
10 misrepresentation it made to the Certified Class, so therefore, they do not meet Proposition 64's  
11 requirement of actual reliance and injury. That is a clear misunderstanding of the threshold  
12 requirements imposed by Proposition 64. Such a holding will have the very undesirable effect of  
13 encouraging defendants, when they were embarking on a course of deception, to engage in deception in  
14 as many different ways as possible, insuring that no victim would be able to state that they were victims  
15 of each of the misrepresentatives.

16 There is substantial evidence that the Class Representatives have been exposed to, and have  
17 relied upon, certain of the misrepresentations and nondisclosures which are a part of Wells Fargo's  
18 systematic and pervasive scheme of deception. That is enough to meet their requirements both  
19 individually and as Class Representatives. The intent behind Proposition 64 was to discourage abusive  
20 class action litigation by requiring that named plaintiffs have valid claims, not to provide a defense to a  
21 case brought by a real consumer who was actually harmed by Defendant's conduct. *Hall v. Time Inc.*,  
22 158 Cal. App. 4th 847, 854 (2008).

23 Reliance is a question of fact to be left to the jury: the California Supreme Court has explained  
24 that "[r]eliance exists when the misrepresentation or nondisclosure was an immediate cause of the  
25 plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or  
26 nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other  
27 transaction." *Alliance Mortgage Co. Rothwell*, 10 Cal. 4th 1226, 1239, 900 P.2d 601, 608-09 (1995).  
28 Under California law, it is not necessary that a plaintiff's reliance upon the truth of the fraudulent  
misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct; it is

1 enough that the representation has played a substantial part, and so has been a substantial factor, in  
 2 influencing his decision. *City Solutions, Inc. v. Clear Channel Communications*, 365 F.3d 835, 840 (9th  
 3 Cir. 2004) (citing *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 976-77, 64 Cal. Rptr. 2d  
 4 843 (1997)).

5 The California Supreme Court, in *Alliance*, also established that “[e]xcept in the rare case where  
 6 the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a  
 7 plaintiff’s reliance is reasonable is a *question of fact*.” 10 Cal. 4th at 1239, 900 P.2d at 609 (quoting  
 8 *Blankenheim v. E.F. Hutton & Co., Inc.*, 217 Cal. App. 3d 1463, 1475, 266 Cal. Rptr. 593 (1990); *Gray*  
 9 *v. Don Miller & Associates, Inc.*, 35 Cal. 3d 498, 503, 198 Cal. Rptr. 551, 674 P.2d 253 (1984)  
 10 “[w]hether reliance is justified is a question of fact for the determination of the trial court”]; *Guido v.*  
 11 *Koopman*, 1 Cal. App. 4th 837, 843, 2 Cal. Rptr. 2d 437 (1991) (“the reasonableness of the reliance is  
 12 ordinarily a question of fact”)) (emphasis added.)

13 Under common law fraud and negligent misrepresentation, the plaintiff must establish justifiable  
 14 reliance and resulting damages. *Lazar v. Superior Court*, 12 Cal.4th 631, 738, 909 P.2d 981 (1996). For  
 15 fraud based on concealment or nondisclosure, the plaintiff must instead establish a duty to disclose,  
 16 which can be done by showing: 1) that the defendant had exclusive knowledge of material facts not  
 17 known to plaintiff, 2) that the defendant actively conceals a material fact from plaintiff, and 3) that the  
 18 defendant makes partial representations but also suppresses some material fact. *Falk v. General Motors*  
 19 *Corp.*, 496 F. Supp. 2d 1088, 1094-97 (2007); *Limandri v. Judkins*, 52 Cal.App.4th 326, 337, 60  
 20 Cal.Rptr.2d 539 (1997). In order for non-disclosed information to be material, a plaintiff must show that  
 21 “had the omitted information been disclosed, one would have been aware of it and behaved differently.”  
 22 *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1093, 23 Cal. Rptr. 2d 101 (1993).

23 Here, all three Class Representatives have seen and relied on Wells Fargo’s misrepresentations;  
 24 were victims of Wells Fargo’s nondisclosure of its practices; and were thereby damaged by being  
 25 assessed unwarranted, expensive overdraft fees. This is established using the evidence that was entirely  
 26 available to Wells Fargo when it submitted its first motion for summary judgment.

**1) Plaintiff Gutierrez Has Standing to Pursue Misrepresentation and Nondisclosure Claims With Regards to Wells Fargo's Practice of Re-Sequencing the Posting of Transactions**

Plaintiff Gutierrez, the Class Representative for the Re-Sequencing Class, believed based on the materials she had reviewed from Wells Fargo, and the statement messages received by Wells Fargo, and most importantly, from the misleading and deception way that Wells Fargo sequenced pending transactions in a chronological order as pending charges online. As discussed in Ms. Gutierrez' declaration to the first motion for summary judgment, (Gutierrez Declaration, Ex. 44), Ms Gutierrez was enrolled in online banking (Gutierrez Deposition (hereinafter referred to "Gutierrez"), Ex. 47, 46:13-20.) She regularly reviewed her Account Activity page online, which listed her pending debit card transactions in chronological order, and she believed that her debit card transactions would be posted on her account the moment she swiped her card. (Gutierrez, Ex. 47, 49:9-15; 47:20-25).

She did not know how there can be sufficient funds when a transaction is approved, but there might not be sufficient funds anymore by the time that transaction gets posted on her account. (Gutierrez, Ex. 47, 96:12-23). The mechanism for this is the re-sequencing of her debit card transactions from chronological order to highest to lowest result sin additional overdraft fees when there is a mistake and an overdraft, a practice which was never adequately disclosed to her or any other customers by Wells Fargo.

As a result of this combination of deception in how pending charges were portrayed in chronological order combined with the non-disclosure and concealment, Gutierrez entered into transactions on October 5 and 6, 2006, which resulted in more overdraft fees than she would have been assessed had Wells Fargo not re-sequenced her transactions. Had she known that she could be charged multiple overdraft charges as a result of Well Fargo's practice of re-sequencing her transactions from chronological order to highest to lowest prior to October 5, 2006, then she would have insured that there was always a higher minimum balance in the account to cover this contingency. (Gutierrez Declaration, Ex. 47.)

In light of the above facts, it is evident that Class Representative Gutierrez reasonably relied on Wells Fargo's misrepresentations and non-disclosures with respect to the practice of re-sequencing her debit card transactions, and that such reliance caused her to be damaged.



1                   **2) Plaintiff Walker Has Standing to Pursue Misrepresentation and Nondisclosure**  
 2                   **Claims With Regards to Wells Fargo's Practice of Including and then Deleting**  
 3                   **the Posting of Authorized Transactions, Resulting in an Inflated Available**  
 4                   **Balance**

5           Plaintiff Erin Walker, a Class Representative for the Including and Deleting Class, was exposed  
 6 to and read the Welcome to Wells Fargo Jacket prior to signing up for her account, which implicitly  
 7 extols the reliability of the online account balance information. (Deposition of Erin Walker (hereinafter  
 8 referred to as "Walker"), Ex.48, 20:5—21:4.) As outlined in her declaration filed in the first motion for  
 9 summary judgment (Walker Decl., Ex. 45), as well as her deposition, she regularly checked her account  
 10 online to check her "available balance" information in order to keep track of her transactions. (Walker,  
 11 Ex. 48, 27:9—21; 29:15-19; 33:20-25).

12           Wells Fargo never disclosed to her or any other customer its practice of including and then  
 13 deleting the posting of certain debit card transactions, which results in inflated "available balance"  
 14 information. Therefore, she never knew that she could be charged an overdraft fee for a transaction  
 15 when at the time of the transaction; her available balance information indicated to her that she had  
 16 sufficient funds in her account to cover the transaction. (Walker Decl., Ex. 45.) Walker believed that  
 17 "available balance" meant money that was actually available, and that the available balance included her  
 18 recent purchases. (Walker, Ex. 48, 34:14-18).

19           In July of 2006, Walker relied on the available balance information, was assessed a number of  
 20 overdraft fees. Had she known about Wells Fargo's practice which caused her to incur additional  
 21 overdraft fees prior to June, 2007, she would have ceased using her Wells Fargo account and changed  
 22 banks, which she did after having been assessed the subject overdraft fees. (Walker Decl.)

23           In light of the above facts, it is evident that Class Representative Erin Walker reasonably relied  
 24 on Wells Fargo's misrepresentations and non-disclosure with respect to "available balance", and that  
 25 such reliance caused her to be damaged.

26                   **3) Plaintiff Smith Has Standing to Pursue Misrepresentation and Nondisclosure**  
 27                   **Claims With Regards to Wells Fargo's Practice of Including and then Deleting**  
 28                   **the Posting of Authorized Transactions, Resulting in an Inflated Available**  
                   **Balance**

          As outlined in William Smith's declaration in opposition to the first motion for summary  
 judgment, Plaintiff William Smith, a Class Representative for the Including and Deleting Class, heavily

1 relied on “available balance” information on Wells Fargo’s website to monitor his accounts. (Smith  
2 Decl., Ex. 46.) Although he was aware from a previous incident that it was possible for a transaction to  
3 fall off the available balance, even though it had already been listed as a pending charge, Wells Fargo  
4 never disclosed to him how, why or when that could happen. (Smith Decl, Ex. 46.) He believed that the  
5 available balance was the liquid balance he could use for any purpose, and that he could trust his  
6 available balance information. (Deposition of William Smith, Ex. 49, 33:11-17; 31:25—32:5.)

7 On July of 2007, Mr. Smith relied on his inflated available balance information provided to him  
8 online by Wells Fargo, and because it was inflated, specifically caused him to overdraft from his  
9 account. (Smith Decl., Ex. 46.) Had the “available balance” information provided by Wells Fargo been  
10 accurate, as he had believed, then he would have avoided both overdraft charges by transferring more  
11 money into this account. (Smith Decl., Ex. 46.).

12 Based on these facts, it is clear that William Smith also reasonably relied on Wells Fargo’s  
13 misrepresentations and non-disclosure with respect to the practice of including and then deleting debit  
14 card transactions from his available balance, and that such reliance caused him to be damaged.  
15 Consequently, all three Class Representatives have standing to bring the misrepresentation and  
16 nondisclosure-based claims, just as the Court has already ruled in its prior Order.

17 Furthermore, the intent of Proposition 64 supports a finding that these Class Representatives  
18 have standing to bring these claims as these are substantial, valid claims brought by actually injured  
19 plaintiffs; this is not a sham class action and there is absolutely no evidence of abuse of the class action  
20 vehicle. Therefore, the Court should deny the Motion of Wells Fargo Bank, N.A. for Partial Summary  
21 Judgment on Plaintiffs’ Misrepresentation Claims in its entirety.

22 **C. The Classes Easily Meet Their Burden for Establishing Reliance and Damages**

23 Although Wells Fargo only attacks the Class Representatives on standing in its motion for partial  
24 summary judgment, it does so attempting to escape its obvious liability for misrepresentations to the  
25 Certified Class. But as set forth in the facts, Wells Fargo had in place an intentional, systematic and  
26 pervasive scheme of misrepresentation and nondisclosure, which had a tendency to deceive a reasonable  
27 Wells Fargo consumer (Declaration of Dr. Lewis Mandell), and resulted in tremendous damages to the  
28



1 members of the Classes and enormous profits to Wells Fargo. That easily provides reliance, intent to  
2 defraud, and damages for the class claims.

3 As the CLRA, UCL, FAL, and common law fraud and negligent misrepresentation claims  
4 involve a similar test for class-wide reliance of whether the actions had a tendency to deceive, the  
5 satisfaction of reliance and damage with any of these causes of action insures reliance and damage for  
6 each of the causes of action. Accordingly, the causes of action will be discussed as a group relating to  
7 the issue of reliance and damages.

8 A class action may be pursued based on an overarching fraudulent scheme involving both  
9 misrepresentation and nondisclosures. *Negrete v. Allianz life Ins. Co. of North America*, 238 F.R.D.  
10 482, 492 (C.D. Cal. 2006); *see also In re U.S. financial Securities Litigation*, 54 F.R.D. 443, 451 (S.D.  
11 Cal. 1974) (in a class action involving a common scheme of deception directed at large number of  
12 investors, a case for fraud may lie based on affirmative misrepresentations or nondisclosure.)

13 As discussed in detail in the fact section, this case involves a systematic and pervasive scheme  
14 by Wells Fargo to explicitly and implicitly misrepresent its practices through statements made in all  
15 available medium, including brochures, commercials, disclosure materials, account terminology,  
16 educational programs, and websites (all intended to entice new customers or misinform current  
17 customers), and to conceal material information as to the subject practices. Therefore, Plaintiffs' claims  
18 are based on an overarching scheme involving both misrepresentation and concealment.

19 Based on the facts presented in the fact section of this method, including the pervasiveness and  
20 force of the language of the misrepresentations, that Wells Fargo intentionally concealed material  
21 information as to their actual practices, and the counter-intuitive and non-common sense nature of these  
22 practices, bolstered by the unopposed (Declaration of Richard D. McCune, ¶51) declaration of a highly  
23 qualified expert, Dr. Lewis Mandell, who declares the misrepresentations and non-disclosures had a  
24 tendency to deceive Wells Fargo customers, Plaintiffs have demonstrated that the members of the  
25 Classes were not aware of the mechanisms of the practices that caused them to artificially incur  
26 additional expensive overdraft fees and have relied on the misrepresentations.

27 Under California law, since direct proof of fraudulent intent is often an impossibility, because the  
28 real intent of the parties and the facts of a fraudulent transaction are peculiarly in the knowledge of those

sought to be charged with fraud, proof indicative of fraud may come by inference from circumstances surrounding the transaction, the relationship, and interest of the parties. *Miller v. National American Life Ins. Co.*, 54 Cal. App. 3d 331, 338-39, 126 Cal. Rptr. 731 (1976). Here, as Wells Fargo's own documents show that Wells Fargo unfairly profited enormously by its conduct at the expense of the class, and that it intentionally concealed information and dispersed misrepresentations, both the intent to defraud and damages elements have easily been met for the class. Consequently, Plaintiffs have established classwide claims for fraud based on misrepresentation and concealment, as well as violations of the UCL, CLRA, FAL and negligent misrepresentation.

V

**CONCLUSION**

Based on the foregoing, Plaintiffs respectfully requests that the Court deny the Motion of Defendant Wells Fargo Bank, N.A. for Partial Summary Judgment on Plaintiff's Misrepresentation Claims in its entirety.

DATED: February 26, 2009.

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BY: 

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